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No. 392

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. McDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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The brief of the United States in opposition to the petition for a writ of certiorari has brought up new matter of some significance not adequately treated in the petition, and pursuant to the provisions of Rule 24(4) of the Supreme Court Rules, this reply is submitted to briefly consider said new matter.

1. On pages 6, 7 and 8 of its Brief, the Government asserts that since the statements made to the witness which defendant sought to introduce were not made prior to or contemporaneously with the preparation and filing of the return, such statements were inadmissible. In doing so, the Government on page 8 of the Brief states the case of *Haigler* v. *United States* 172 F. 2d 986 (CA-10) is distinguishable.

In *Haigler v. United States*, the Court of Appeals, Tenth Circuit stated:

> "We have said that where, as here, motive or bad purpose is an essential element of the offense charged, the accused may not only directly testify that he had no such motive or purpose, but he may, within rational right, buttress such statement with testimony of revelant circumstances, including conversations had with third persons or statements made by them, tending to support his statement . . . ' *Miller* v. *United States*, 10 Cir., 120 F. 2d 968, 980."

Part of the evidence excluded in the Haigler case, as stated by the Court, was testimony that defendant

> ". . . called to the attention of his auditor the balance of approximately $5,000.00 in the account *about thirty days after his income tax return had been filed*, and that he understood, or was led to believe, that it would be reflected in an amended return." (Emphasis added).

The Court ruled that this, together with other excluded testimony, was "plainly admissible as bearing upon the essential element of intent," and that it was error to exclude it.

Petitioner herein first consulted the accountant a month or two after the 1951 return was filed.

2. Since the Government in its Brief set out in its "Statement" a summary of the evidence to support the verdict, and this summary does not accurately and fully summarize all of the evidence, petitioner deems it necessary to make a further statement with respect thereto.

Most of the evidence summarized by the Government applied equally to the first two counts on which an acquittal was obtained. The evidence on the third count had the added feature that the 1951 return was filed after petitioner obtained the idea at a convention that he had been filing his returns incorrectly. (T. 109, 118) Consequently what he did and said to a C. P. A. shortly after filing the 1951 return takes on added significance as bearing upon intent.

The Government's Brief asserts petitioner reported only the amount he determined had been spent on personal expenses, determined by those checks issued for such purposes. This is inaccurately stated. Petitioner drew one or two checks each month on the business account, made payable to himself, which he deposited in his personal account. (T. 89, 174) Only on two or three occasions during the three years were checks on the business account written for personal expenditures. (Exh GG, T. 176) These checks to self were deemed by the petitioner and his wife to be petitioner's income. These are the checks that were totaled to arrive at reported income. (T. 90) Petitioner and his wife believed that nothing received from the sale of houses, for subcontract work or for interest, was income until petitioner withdrew the money from the business for personal use. (T. 90, 108) Practically all

of the increases in net worth over the years were due to increases in notes and contracts receivables (T. 162) and petitioner's concept of income was that such would be income only when cash payments were received and withdrawn for use by him as an individual, separate and apart from the business. (T. 90, 108)

The Government alleges (Br. p. 4) these sums withdrawn for personal use were reported as "wages," and that none of the firms or individuals listed had paid wages to petitioner. Sources of income were listed in the space provided for listing "wages, salaries, bonuses, commissions and other compensation." (T. 146, 147) There was no representation that they were "wages." On the contrary, no withholding tax was shown as having been withheld, (T. 146, 147) the total of income shown as received of $7,135.00 was shown in Schedule C as being receipts from business *as well as from self-employment.* (T. 147, 148) Sutherland and Schofield both paid him compensation for work done. (T. 108)

The Government suggests that petitioner refused to permit inspection of his receipts and disbursement records (Br. p. 5). The complete facts ought to be stated. The Revenue Agent, when he began the investigation, was in petitioner's home on several occasions, was given access to everything he desired (T. 89) and certain requested records were turned over to him. (T. 20, 21) Counsel was consulted after the Special Agent entered the investigation. The Special Agent was advised that Counsel could not intelligently advise petitioner concerning his records until a study was made of them. (T. 80, 81) The Agent immediately ex-

pedited his investigation and forwarded the case within six months to save the year 1949. (T. 78, 79, 81) During the investigation, at a conference and before trial many facts were furnished to the Agent by Counsel (T. 14, 80, 82, 84).

Many other facts not mentioned by the Government show innocence of tax evasion motives and a lack of understanding. Petitioner each quarter filed employment tax returns. (T. 166) Upon one an amendment was voluntarily made and additional tax paid. (T. 166) The lending institutions from whom petitioner *borrowed* money were listed as sources of income. (T. 108) The receipt and disbursement of all monies were accurately and properly entered in the records. (T. 14) With one or two nominal exceptions, which were noted on the records, all funds were deposited in the business bank account. (T. 180, 181) Upon three occasions petitioner's wife, who kept all records and wrote practically all the checks, (T 177) used funds in small amounts received on collections. These were repaid to the business bank account by checks drawn on the personal account. (T. 90, 91, 170, 173) In support of the fact that petitioner considered his income to be only what he withdrew from the business is the very important fact that whenever petitioner filed a financial statement with lending institutions and was required to state what his annual income was, he placed it at $6,000.00 or $7,000.00, consistent with what he reported.[1] (T. 47, 109, 152, 153, 169, 170, 171) On financial statements one would ex-

(1) He so stated on nine different occasions in 1948, 1949, 1950 and 1951.

aggerate, not minimize, his income. After learning at the Convention that he apparently had been preparing his returns incorrectly, he filed his 1951 return as he had done in the past and then consulted an attorney and a C. P. A., (T. 110) and the C. P. A. and petitioner's wife began working on the books to correct the matter. (T. 111)

This is a case of failing to file a correct return through ignorance and a lack of understanding. The conviction, fine and imprisonment on the third count is a serious miscarriage of justice. It should not be allowed to stand.

Respectfully submitted,

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PROOF OF SERVICE

I, Bryant H. Croft, of counsel of record for petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 5th day of October, 1957, I served, on behalf of petitioner herein, copies of the foregoing Reply to Brief of the United States in Opposition by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing two copies thereof in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

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Of Counsel of Record for Petitioner